



September 21, 2017

Office of Counsel
Freedom of Information Request
US Army Corps of Engineers
PO Box 3755
Seattle, WA 98124-3755

EPA Region 10
FOIA Officer
1200 Sixth Ave., Suite 900
Seattle, WA 98101-3140

Freedom of Information Request
National Oceanic and Atmospheric Administration
7600 Sandpoint Way NE
Seattle, WA 98115-6349

To Whom It May Concern:

With this letter, Earthjustice hereby renews its previous Freedom of Information Act ("FOIA") request, dated June 6, 2014 (attached herewith). It seeks documents described in our previous letter that were either generated after your respective responses to the 2014 FOIA or were otherwise not provided in that response. In addition to the records described in the 2014 request, we further request all documents that address, either directly or indirectly, or where generated in response to, the June 24, 2015 Petition to EPA and Seattle District Army Corps seeking a special case determination and approved jurisdictional determination regarding the scope of Army Corps Seattle District Clean Water Act jurisdiction.

We further renew our request for a fee waiver, as described in our 2014 FOIA.

If any element of this request is not clear, please do not hesitate to call me at 206 343 7340 x 1025. Thank you for your prompt attention to this request.

Sincerely,

Jan Hasselman

COPY

June 6, 2014

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To Whom It May Concern:

This is a request for information under the Freedom of Information Act. Earthjustice seeks to educate itself, its clients, and the public on the Army Corps' implementation of its Clean Water Act § 404 program and, specifically, on the Corps' position that § 404 jurisdiction in Puget Sound reaches to the mean higher high water mark ("MHHW") rather than the true high tide line (sometimes referred to as highest astronomical tide ("HAT")), as directed by 33 C.F.R. § 328.3(d) (defining high tide line) and § 328.4(b)(1) (establishing § 404 jurisdiction up to high tide line). Earthjustice makes this request for information pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and its implementing regulations.

Records Sought in this Request

The term "records" as used in this request includes all of the following: all writings of any kind, in draft or final form, including reports, studies, correspondence, emails, notes from meetings, graphs, charts, photographs, or any other data compilations from which information can be obtained or translated. Earthjustice seeks disclosure of the following information from each of the three agencies:

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1) All records reflecting or relating to inter-agency analysis, discussion or correspondence regarding the boundaries of the Corps' CWA § 404 jurisdiction in Puget Sound's tidally influenced waters.

2) All records reflecting or relating to intra-agency analysis, discussion or internal correspondence regarding the boundaries of the Corps' CWA § 404 jurisdiction in Puget Sound's tidally influenced waters.

3) Any records reflecting Army Corps' directives, guidance, rules, or other authorities regarding the appropriate tidal limit of Army Corps' CWA § 404 jurisdiction.

4) Any records relating to specific projects, of which the agencies are aware, which were not subject to Army Corps' § 404 jurisdiction because dredge or fill material was placed above MHHW, but for which dredge or fill material was, or was potentially, placed lower than HAT.

If the agencies believe that any category of requested information is covered by a FOIA exemption and intends to withhold it, we request prompt disclosure of all non-exempt information as well as an explanation for the grounds on which the exempt information is being withheld. I would be glad to work with you and your staff to identify the documents sought in this letter and work toward crafting a response that satisfies this request. If there are alternative formats or approaches to responding to this request, I would be happy to discuss them. Please do not hesitate to call should you need clarification.

Fee Waiver

Under 552 U.S.C. § (a)(4)(A)(iii), an agency must furnish documents without charges or at a reduced rate "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government" and is "not primarily in the commercial interest of the requester." The legislative history of the fee waiver standard "clearly indicates" that Congress intended to create a public interest/benefit test for granting FOIA fee waivers that was to be "liberally construed" and was "consistently associated with requests from journalists, scholars, and *non-profit interest groups* who it was intended to benefit." Ettinger v. Federal Bureau of Investigation, 596 F. Supp. 867, 872 (D. Mass. 1984) (emphasis added); see also McClellan Ecological Seepage Situation (MESS) v. Carlucci, 835 F.2d 1282, 1284 (9th Cir.1987) ("The fee waiver provision must be 'liberally construed in favor of noncommercial requesters'"); Better Government Ass'n v. Department of State, 780 F.2d 86, 94 (D.C. Cir. 1986) (Congress "explicitly recognized the importance and the difficulty of access to governmental documents for under-funded organizations and individuals.") Congress was also concerned that search and duplication fees not be used as an obstacle to disclosure of requested information. Eudey v. Central Intelligence Agency, 478 F. Supp. 1175 (D.D.C. 1979). Agencies may not reject an objectively supportable assessment of the value and usefulness of the requested material and substitute its own determination. Ettinger, 596 F. Supp. at 875.

Earthjustice requests a waiver of all search and copying fees associated with this request. FOIA and its implementing regulations state that agencies must waive fees where disclosure is likely to contribute significantly to public understanding of the operations and activities of the government and the request is not primarily in the commercial interest of the requesters. See 5 U.S.C. § 552(a)(4)(A)(iii); 15 C.F.R. § 4.9(c). This request satisfies these criteria.

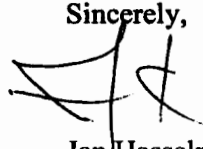
Earthjustice seeks this material because there is a real and important dispute regarding the Corps' interpretation of its jurisdiction that is having substantial adverse impacts on the ecology of Puget Sound. Specifically, numerous actions to armor Puget Sound shorelines have long had adverse impacts on shoreline ecology and, consequently, on species like salmon and orcas. Most such projects fall outside of the Corps' jurisdiction, as interpreted to be limited to the line of the MHHW. However, if the Corps applied its regulations to exercise jurisdiction over projects that result in placement of dredge or fill material up to the HAT, many more armoring projects would require Corps review.

Earthjustice is uniquely qualified to review the requested information and synthesize it for consumption by the general public and its clients, which include national, regional, and local conservation organizations, Indian tribes, and community groups. Earthjustice and its clients have substantial expertise regarding the effects of habitat degradation and its impacts to listed aquatic species, expertise that enables Earthjustice to evaluate the requested records and make informed judgments as to their content. Earthjustice and its clients engage in extensive advocacy on the issue of fish habitat conservation in the administrative and judicial processes.

In sum, Earthjustice and its clients will ensure that the information obtained through this request will make a significant contribution to public understanding of the extent to which the Corps exercises its jurisdiction over shoreline projects in Puget Sound. Thank you for your assistance, and we look forward to prompt receipt of the requested documents, as required by FOIA and its implementing regulations.

If I can be of any assistance, please don't hesitate to contact me at (206) 343-7340, ext. 1025.

Sincerely,



Jan Hasselman